CHAPTER #3

10:15 – 10:45am

Use of Co-Counsel to Expand Your Reach

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Electronic format only:
1. RPC 1.5(e)
2. Sample Fee Agreement
3. Sample Agreement to Associate
4. Sample Co-Representation Agreement
5. Sample Contract Agreement
6. Additional Excerpts

The electronic version of all of the documents are available on the KCBA website:
RPC 1.5(e)

A division of a fee between lawyers who are not in the same firm may be made only if:

(1) (i) the division is in proportion to the services provided by each lawyer or each lawyer assumes joint responsibility for the representation;

(ii) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(iii) the total fee is reasonable; or

(2) the division is between the lawyer and a duly authorized lawyer referral service of either the Washington State Bar Association or of one of the county bar associations of this state.

COMMENT

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.
Sample Stand-Alone Fee Splitting Agreement for Bringing in Co-Counsel Midstream

[Date]

[Client]

Re: Fee Splitting

Dear [Client],

We would like to work as co-counsel on your case. If you consent to this, we would take joint responsibility for work on your case. You would pay the same fee as outlined by your original fee agreement with [original counsel]. Any fee we earn would be split equally between us. Your signature below indicates you understand and agree to this division of fees.

You may consult another attorney or other advisor about this agreement before signing.

Very truly yours,

[ Diligent Attorneys ]

Accepted this _____ day of ________.

______________________________
[Client]
Sample Fee-Splitting Clause in a Fee Agreement

[First Attorney’s] hourly rate is $____ and [Second Attorney’s] hourly rate is $____. We (the two attorneys) are going to split the attorney’s fees in proportion to our hourly rates multiplied by the hours we work on your case. Each lawyer assumes joint responsibility for your case.
SAMPLE Agreement to Associate

RE: [case]

This agreement is to confirm the agreement of [ATTORNEY/FIRM A] and [ATTORNEY/FIRM B] to associate on the above referenced case. [GENERAL DESCRIPTION OF CASE AND CURRENT PROCEDURAL STANDING]

[FIRM B] will associate on this matter and provide assistance on all pre trial matters and will “second chair” the case at trial. This is anticipated to include, but may not be limited to, work on all of the following: witness preparation, trial strategy, motions in limine, mediation, jury instructions, trial brief, voir dire, jury questionnaire, all pre trial court filings, trial, and any post trial work such as a petition for fees.

[FIRM A] has carried all costs incurred in handling the case and has maintained the client funds in an IOLTA trust account, and will continue to do so. [FIRM B] acknowledges that this file is a “King County Lawyer Referral Service” matter and therefore 10% of any attorneys’ fees recovered must be transmitted to King County Lawyer Referral Service.

[FIRM B] will primarily be compensated by way of a contingency fee based upon recovery.

If this case settles, is awarded judgment, or if fees are awarded after trial, any attorneys fees recovered will be divided as follows (after the deduction of 10% to King County Lawyer Referral Service):

a. [X]% of the total to [FIRM A] in recognition of carrying costs and handling administration;

b. [X]% of the total divided pro rata based on hours worked on the case without respect to hourly fee of each attorney.

This agreement shall be effective upon the signature of both parties, and may be executed in parts, and an electronic signature shall be valid.

If any disputes regarding this agreement arise at any time, the Parties shall attempt to resolve any such dispute through good faith efforts. If, after good faith efforts, the Parties are unable to agree, then the Parties will seek resolution of any such dispute by submitting the said dispute to binding arbitration in front of a mutually agreeable arbitrator. The Parties agree to be bound by such ruling and the prevailing party shall be awarded the costs of any dispute resolution proceeding.

The Parties to this agreement knowingly and expressly disclaim and hereby waive any right or ability to assert the lack of enforceability of this Agreement or to challenge the adequacy of enforceability of this Agreement before any court, arbitrator, or mediator. This Agreement constitutes the full and complete agreement between the Parties.

DATED this ____ day of [DATE].

_________________________________  ______________________________
[FIRM A ATTORNEY]      [FIRM B ATTORNEY]
LIMITED SCOPE CO-REPRESENTATION AGREEMENT

BETWEEN LAWYERS

This agreement is between [ATTORNEY/FIRM A] and [ATTORNEY/FIRM B] (collectively “the Parties”). This agreement establishes the relationship between two lawyers in the representation of [CLIENT] in a matter of [CLAIMS].

1. The attorneys’ fees in the case will be shared as follows:
   a. [FIRM A] and [FIRM B] agree that the proportion of the fee recovered in the case will be apportioned as follows:
      i. _____% of the judgment shall be apportioned with [FIRM B] receiving _____% after deduction of expenses and costs, and [FIRM A] receiving _____%.
      ii. The remaining ______% of the judgment shall be apportioned to [FIRM A] and [FIRM B] according to the hours worked on the case. The Parties shall be responsible for accounting for the hours worked on the case by recording the date, amount of time spent, and a brief description of the work performed.

2. [FIRM A AND B] will be jointly responsible for the case, and we have advised the Client of the basis upon which we are sharing the fee. We will handle the day-to-day work up of the case, including but not limited to: preparing and filing a complaint, responding to and propounding discovery on the defendant, handling the plaintiff’s deposition and other depositions, liability work up of the case through trial and any appeals, and settlement proceedings, if any.

3. [FIRM B] will assume the role of lead counsel and be responsible for expenses.

4. Expenses will be reimbursed out of settlements or judgments received pursuant to the provisions in paragraph one above. In the event that [FIRM A] incurs expenses in connection with the matter, they will be reimbursed at the conclusion of the matter. In the event no recovery is obtained sufficient to cover expenses, the expenses will be borne by [FIRM B], except for those actual expenses already incurred by [FIRM A].

5. For Clients’ information and benefit, the parties agree that nothing in this agreement changes the terms of representation between [FIRM B] and Clients.

6. If any disputes regarding this agreement arise at any time, the Parties shall attempt to resolve any such dispute through good faith efforts. If, after good faith efforts, the Parties are unable to agree, then the Parties will seek resolution of any such dispute by submitting the said dispute to binding arbitration in front of a mutually agreeable
arbitrator. The Parties agree to be bound by such ruling and the prevailing party shall be awarded the costs of any dispute resolution proceeding.

7. The Parties to this agreement knowingly and expressly disclaim and hereby waive any right or ability to assert the lack of enforceability of this Agreement or to challenge the adequacy of enforceability of this Agreement before any court, arbitrator, or mediator. This Agreement constitutes the full and complete agreement between the Parties.

DATED as of this _____ day of ________,______.

[SIGNATURES]
SAMPLE CONTRACT AGREEMENT

[Solo/small firm] and I as its sole proprietor, [attorney], agree to serve as a contract attorney performing legal services for [firm] beginning [date].

For legal services, typically including but not limited to legal research and writing, I charge a rate of [amount] per hour worked, prorated to six minute increments. I agree to [description of services, project, start/end dates, projected hours, etc]

I will report hours worked to [firm] on a monthly basis in a timesheet identifying the case worked on, date the work was performed, the hours worked each day, prorated to six minute increments, and a general description of the work performed. I ask that [firm] pay for my services by check, made out to [solo/small firm], either by postal mail or hand delivery, within 15 days of receiving my timesheet, regardless of whether [firm] has been paid her fees or costs for the case.

I agree to maintain confidentiality appropriate to the attorney-client relationship, and to alert [firm] immediately should any conflict of interest arise that would bar me from working in compliance with the Rules of Professional Conduct.

Please indicate your agreement to these terms in a response email.

Thanks, and I look forward to working together!

Best,
[attorney]
Use of Co-Counsel to Expand Your Reach - 8

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170 P.3d 37

John A. HOGlund, individually and as owner and agent of John A. Hoglund, P.S., Respondent,

V.

Steven MEeKS, Jay Goldstein and Sherelle Willingham; Goldstein Law Office, Appellants.

No. 34992-2-II.

Court of Appeals of Washington, Division 2

July 24, 2007

170 P.3d 38 [Copyrighted Material Omitted]

170 P.3d 39 [Copyrighted Material Omitted]

170 P.3d 40 Steven Meeks, Olympia, WA, pro se.

John Michael Morgan, J. Michael Morgan PLLC, Olympia, WA, for Appellants.

Michael Wayne Johns, Davis Roberts & Johns PLLC, Gig Harbor, WA, for Respondent.

OPINION

HUNT, J.

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¶ 1 This case involves breach of a fee-sharing contract among attorneys who at various times served as a plaintiff's attorney in a personal injury lawsuit otherwise unrelated to this appeal. Defendants Steven Meeks, Jay Goldstein, and Sherelle Willingham appeal the trial court's liquidated damages award and dismissal of their claim alleging breach of contract. We affirm.

¶ 2 Holding that Willingham had apparent authority to enter into a fee-sharing contract with Hoglund, we affirm.

170 P.3d 41 FACTS

I. LEGAL REPRESENTATION

A. Original Contract Between Willingham (at Graf Firm) and Hoglund

¶ 3 Following an automobile accident in June 2000, in which he was injured, Robert Bostwick entered into a contingent fee agreement with Olympia attorney F. Daniel Graf. Graf agreed to represent Bostwick in his personal injury case with the understanding that Graf could associate outside counsel to assist in Bostwick's representation.

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Their fee agreement provided for a one-third contingent attorney fee on any recovery from the litigation. Paragraph 10 of the fee agreement stated that an attorney withdrawing from Bostwick's representation would receive no fee.

¶ 4 Sherelle Willingham, an associate attorney at Graf's law firm, was the primary contact and lead attorney for Bostwick. In June 2001, Graf entered into an association of counsel agreement with attorney John Hoglund. Under the agreement, Hoglund was the lead attorney; he undertook the primary representation of Bostwick and, in return, he was entitled to 80 percent of the contingent fee if he recovered damages for Bostwick. Once Hoglund obtained Bostwick's file, Willingham's involvement was "limited to periodic, regular conferences" with Hoglund's paralegal. Hoglund and Willingham had very limited contact concerning the Bostwick litigation.

¶ 5 Between June 2001 and July 2003, Hoglund provided most of the legal assistance on Bostwick's case. Hoglund filed the complaint, engaged in discovery, and retained expert witnesses. He also attended a mediation with Bostwick and the tortfeasor's insurance company and procured and rejected a $150,000 settlement offer as too low, telling Bostwick that the offer would increase once the insurance company had an opportunity to evaluate the claim fully.

B. Willingham Leaves Graf Firm for Goldstein Firm

¶ 6 While Hoglund was working on Bostwick's
case, in July 2001, Willingham left the Graf law firm to work part-time at the Goldstein Law Office. Graf allowed Willingham to take her personal injury cases to Goldstein, one of which was Bostwick's case.

§ 7 At the Goldstein firm, Willingham handled several cases that had originated with the Graf firm and contained a fee arrangement with Hoglund similar to their fee agreement in the Bostwick litigation. When Hoglund settled or resolved a case that had originated at the Graf law firm, he would send a portion of the attorney's fee to Willingham.

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the Goldstein Law Office. Willingham would then, in turn, forward a portion of this check to Graf. This relationship continued for two years with no problems. Hoglund and Willingham split fees on cases without a written agreement.

C. Hoglund Downsizes Practice; Negotiations for Bostwick's Future Representation

§ 8 In September 2003, Hoglund downsized his practice, associated with another law firm, [1] and explained to Bostwick that he wanted to bring in another lawyer from his new firm to assist with the litigation. Bostwick refused and asked Hoglund to bring Willingham back into the litigation and to transfer his file to her.

1. Hoglund and Willingham discuss roles

§ 9 Graf was disbursed. For this reason, on September 26, Willingham sent a letter from the Goldstein Law Office to Bostwick explaining that they needed to terminate their legal services agreement with Graf and to enter into a new agreement with the Goldstein firm and a new association of counsel agreement with Hoglund. Hoglund received a copy of this letter.

§ 10 On September 29, Hoglund told Willingham that he no longer wished to be the lead trial attorney for the Bostwick litigation.

[170 P.3d 42] but he would continue to handle strategy issues and to assist in managing the file. Willingham told Hoglund she wanted him to remain on the case and that she had reservations about taking over as the lead trial attorney herself.

§ 11 Hoglund and Willingham discussed the future fee arrangement for the Bostwick litigation. Hoglund suggested that he receive 80 percent of the contingent fee on the first $150,000 of recovery, because he had already negotiated a settlement offer in that amount for Bostwick. 50 percent of any additional contingent fee if the case settled at a future mediation; and 10 percent of any additional contingent fee if the case went to trial. Not reaching a definitive agreement on the exact breakdown of the fee split, they decided to revisit the issue. Hoglund knew, however, that Willingham needed the Goldstein firm's assent Before any agreement on future fees became final.

§ 12 Hoglund continued to work on the Bostwick litigation. He revised and finalized interrogatory answers, met with the case's expert physician, and advanced the associated expenses.

§ 13 By early October, Willingham confirmed that she had filed a co-counsel association document in the Bostwick litigation. She told Hoglund that she was finalizing a draft association agreement with the Goldstein firm for him to sign. Hoglund turned over all of his work product to Willingham, including his correspondence and notes, interrogatory answers, analysis of previous medical care, analysis of medical diagnoses, evaluation of the case's weaknesses and strengths, trial preparation, and a "complete mediation preparation and presentation materials." Clerk's Papers (CP) at 1116-17. The record does not show whether Willingham ever finalized the Goldstein association agreement for Hoglund to sign.

2. Willingham's association with Meeks

§ 14 Uncomfortable acting as Bostwick's lead trial attorney, Willingham contacted Steven Meeks, who leased office space from the Goldstein firm. Meeks agreed to substitute for Hoglund as lead counsel in the Bostwick litigation. Bostwick agreed to Meeks' serving as the lead trial attorney. Meeks never entered into a written fee agreement with Goldstein, Willingham, or Bostwick.

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3. Discussions among Hoglund, Willingham, and Meeks

§ 15 Hoglund, Willingham, and Meeks arranged to meet to discuss the Bostwick litigation on December 2 and 17. The parties did not reach an agreement on Hoglund's future role in the litigation or Hoglund's final compensation.

§ 16 Hoglund still believed he was assisting with Bostwick's case by working on the medical issues, trial strategy, and preparing for the second mediation. He was willing to attend depositions, but he did not want to be involved in the actual trial. At this point, neither Meeks nor Willingham had performed any significant work on the case, and neither expressly told Hoglund that they no longer wished for him to be involved in the case. Although Meeks was convinced that Hoglund would no longer be useful if he was unwilling to appear in court at trial, Meeks did not tell Hoglund that Meeks saw no role
for Hoglund in the Bostwick litigation or that Meeks did not believe Hoglund was entitled to any portion of the contingent fee.

¶ 17 January 2004 passed with no contact among the attorneys. On February 4, 2004, Willingham informed Hoglund that it was too early to discuss his final fee but that she was still working on the agreement. Later in the month, Willingham informed Hoglund that Meeks agreed with Hoglund's assessment of the case and that Willingham and Meeks would attempt another mediation.

¶ 18 At the end of February, Hoglund received a phone call from Defendant attorneys informing him that they wished to organize another mediation for the Bostwick litigation. Hoglund referred the call to Willingham. In March, Willingham sent Hoglund an order substituting Meeks as counsel of record for Bostwick. No explanation accompanied the substitution of counsel order. Hoglund, however, assumed that the substitution order was necessary for Meeks and Willingham to take over his (Hoglund's) role as the primary lead attorney in the mediation [170 P.3d 43] while Hoglund's role diminished, but did not disappear.

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4. Settlement

¶ 19 Willingham and Meeks prepared for the second Bostwick mediation by producing a detailed medical history to refute any defense claims of a pre-existing injury and lack of causation. Neither Meeks nor Willingham supplemented Hoglund's previous submissions with any additional documentation or argument.

¶ 20 Willingham and Meeks presented Bostwick's case at the mediation. Bostwick's defendant offered to settle for $840,000. Meeks and Willingham agreed to reduce the contingent attorney fee to 23 percent if Bostwick accepted the settlement offer, which he did. Meeks and Willingham received $190,000 in attorney fees, which they did not share with Hoglund.

¶ 21 Willingham updated Hoglund on Bostwick's acceptance of the settlement. She told Hoglund that (1) he would receive "80 percent of the first $50,000, reduced by a pro rata share of what we had reduced the fee," Report of Proceedings (RP) at 107; and (2) she would have to check with Goldstein and Meeks to confirm the final sum. Meeks, however, did not believe that Hoglund was legally entitled to any portion of the attorney fees. Consequently, Meeks and Goldstein reimbursed Hoglund only for his out-of-pocket expenses in the Bostwick litigation, approximately $6,000.

II. PROCEDURE

¶ 22 Hoglund sued Meeks, Willingham, and Goldstein to recover attorney fees in Bostwick litigation. He sought damages under three alternative theories: breach of contract, quantum meruit, and unjust enrichment. Willingham claimed that she had not received proper service of Hoglund's complaint and summons.

¶ 23 During a one-day bench trial, the parties testified consistently with the above facts. Goldstein and Willingham testified that Willingham did not have actual authority from the Goldstein firm to contract with Hoglund about attorney fee apportionment in the Bostwick litigation.

¶ 24 The trial court found that (1) Hoglund was the most credible witness; (2) it "had difficulty" with Meeks' credibility; (3) there was a contract between Hoglund and Willingham/Meeks to apportion attorney fees; and (4) Willingham had apparent authority to contract for Goldstein [2]

¶ 25 As for the attorney fee contracts, the trial court reasoned that (1) the parties had firmly settled on Hoglund's entitlement to 80 percent of the $50,000 contingent fee from the original $150,000 settlement offer; [3] (2) but the parties did not agree to the exact terms for any additional amounts; and (3) thus, Hoglund could not recover in contract on any amount over $40,000.

¶ 26 Hoglund presented the trial court with a declaration from the process server to show sufficient service of the complaint. Supported by a declaration from her secretary,

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Willingham testified that she had not received timely service. The trial court believed the process server.

¶ 27 The trial court awarded Hoglund $40,000 for breach of contract, with prejudgment interest beginning on April 15, 2004.

¶ 28 Defendants appeal.

ANALYSIS

I. WILLINGHAM'S AUTHORITY TO CONTRACT

¶ 29 Defendants challenge the trial court's finding that Willingham had apparent authority to contract for the Goldstein firm when she entered into fee-sharing agreements with Hoglund. This challenge fails.

A. Apparent Authority

¶ 31 A trial court may find apparent authority based only on the principal's actions toward a third party and not based solely on the agent's actions. Nonetheless, actual authority to perform certain services on a principal's behalf results in implied authority to perform the usual and necessary acts associated with the authorized services.

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Larson v. Bear, 38 Wash.2d 485, 490, 230 P.2d 610 (1951). In addition, a party dealing in good faith with an agent who appears to be acting within the scope of the agent's authority is not bound by undisclosed limitations on the agent's power. Feely Lumber Co. v. Bookstaver-Burns Lumber Co., 181 Wash. 503, 510, 43 P.2d 953 (1935). As our Washington Supreme Court has articulated:

[The principal is bound by the act of his agent when he has placed the agent in such position that persons of ordinary prudence, reasonably conversant with business usages and customs, are thereby led to believe and assume that the agent is possessed of certain authority and to deal with him in reliance upon such assumption.


B. Willingham's Apparent Authority to Contract on Behalf of Goldstein Firm

¶ 32 The relationship among Hoglund, Goldstein, and Willingham corresponds to cases where an agent's authority to perform particular services on behalf of a principal creates the implied authority to perform the usual and necessary acts essential to carry out the authorized services. See Walker v. Pacific Mobile Homes, Inc., 68 Wash.2d 347, 351, 413 P.2d 3 (1966).[5]In Walker, our Washington Supreme Court addressed a mobile home salesman's apparent authority to take consignment of the plaintiff's trailer on behalf of his employer, the mobile home dealer, even though it was clear that the salesman had no actual authority. In finding apparent authority, the Court relied on the salesman's general appearance of authority: The dealer had placed the salesman on a mobile home sales lot displaying the dealer's name, in circumstances such that there was no reason for a prudent person to question whether the salesman lacked full authority to deal in mobile homes, including the power to accept consignments on the dealer's behalf. 68 Wash.2d at 350-51, 413 P.2d 3.

[170 P.3d 45] ¶ 33 Similarly here, Goldstein placed Willingham in a position in which a reasonable person would believe he had the authority to represent clients on behalf the Goldstein firm, including having authority to enter into an attorney-fee-sharing contract with lawyers outside the firm. Furthermore, Goldstein specifically allowed Willingham to have exclusive control over the Bostwick litigation. He allowed her (1) to negotiate with Bostwick to retain the Goldstein law firm; (2) to file a co-counsel agreement associating Hoglund in the Bostwick litigation in the Cowlitz County Superior Court; (3) to contact Meeks to obtain his services; (4) to instruct Bostwick to reimburse Hoglund $6,000 in expenses; (5) to obtain over $100,000 in fees in the Bostwick litigation; and (6) to reduce the contingent fee agreement in order to persuade Bostwick to accept the insurance company's settlement offer at the second mediation.

¶ 34 In addition, an agent's unlimited use and access to her principal's stationery, business forms, and control of the office justifies the third party's reasonable belief in the agent's authority. Compare Walker, 68 Wash.2d at 351, 413 P.2d 3 with Smith, 63 Wash. App. at 357-58, 818 P.2d 1127, (no finding of apparent authority when communication with agent neither occurred at principal's office nor on principal's letterhead). Here, Willingham communicated with Bostwick and Hoglund using Goldstein Law Firm stationery; her superior court pleadings showed the Goldstein name, address and phone number; and she held Bostwick litigation meetings at the Goldstein Law Offices, all with Goldstein's tacit approval. Thus, under Walker, Willingham's use of the Goldstein firm stationery, pleading paper, and facilities further underscored her apparent authority to act on the firm's behalf.[6]

¶ 35 Goldstein contends that these facts could not create such apparent authority in Willingham because he never communicated with Hoglund himself about anything, particularly not with respect to Willingham's authority to act on behalf of his firm. This challenge fails.

¶ 36 Case law does not so narrowly confine conduct creating apparent authority to express written or oral communication. See Estate of Freitag v. Frontier Bank, 118 Wash. App. 222, 229, 75 P.3d 596 (2003) (principal creates apparent authority by "written or spoken words or any other conduct of the principal") (emphasis added); Enrich v. Connell, 41 Wash. App. 612, 621-22, 705 P.2d

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288 (1985) (apparent authority may stem from agent’s actions taken with the principal’s knowledge), reversed on other grounds by Enich, 105 Wash.2d 551, 716 P.2d 863 (1986); RESTATEMENT (SECOND) OF AGENCY § 27 (2005). That Goldstein had no direct written or verbal contact with Hoglund does not undermine the trial court’s finding of Willingham’s apparent authority. On the contrary, it was Goldstein’s knowledge and approval, whether tacit or express, of Willingham’s ability to control all aspects of the Bostwick litigation that gave rise to Hoglund’s reasonable belief that Willingham had authority to negotiate his fee for his work on the Bostwick case.

§ 37 From the perspective of a reasonably prudent person, such as Hoglund, we see no qualitative difference between Willingham’s apparent authority to manage and to control the Bostwick litigation and her ability to negotiate a fee-splitting agreement in connection with this litigation. We, therefore, affirm the trial court’s ruling that Hoglund reasonably believed that Willingham had authority to contract on behalf of the Goldstein-

[170 P.3d 46] firm, including authority to enter into an attorney-fee-splitting agreement with him.[7]

II. CONTRACT FORMATION

§ 38 Having held that Willingham had the Goldstein firm’s apparent authority to enter into a fee agreement with Hoglund, we next address whether she and Hoglund actually formed an enforceable contract under which Hoglund was to receive a share of the Bostwick litigation attorney fees. Again agreeing with the trial court, we hold that they did enter into such a contract.

A. Standard of Review


§ 40 A contract may be oral as well as written, and a contract may be “implied in fact with its existence depending on some act or conduct of the party sought to be charged.” Bell v. Hegewald, 95 Wash.2d 686, 690, 628 P.2d 1305 (1981). A trial court may deduce mutual assent from

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the circumstances, whereby the court infers a contract based on a course of dealings between the parties or a common understanding within a particular commercial setting. Bell, 95 Wash.2d at 691, 628 P.2d 1305.

§ 41 Whether parties manifested mutual assent to form a contract is generally a factual question. Keystone, 152 Wash.2d at 178 n. 10, 94 P.3d 945. Thus, we review the trial court’s finding for substantial evidence. Pilcher v. Dept’ of Revenue, 112 Wash. App. 428, 435, 49 P.3d 947 (2002), review denied, 149 Wash.2d 1004, 67 P.3d 1096 (2003). Substantial evidence is evidence sufficient to convince a fair-minded, rational person of the truth of the finding. Pilcher, 112 Wash. App. at 435, 49 P.3d 947. Further, we review the evidence in the light most favorable to Hoglund, the prevailing party. Id.

B. Hoglund’s Contract with Willingham

§ 42 The trial court found that at the September 2003 meeting, Hoglund and Willingham orally modified the original Graf fee contract, agreeing that Hoglund would step down as lead counsel, remain on the case in a limited capacity, turn over his litigation materials to Willingham, and be entitled to receive $40,000 from a recovery in the Bostwick litigation because this figure was 80 per cent of the contingent fee on the original settlement offer that Hoglund negotiated on Bostwick’s behalf. More specifically, the trial court found Hoglund credible when he testified that at their initial September 2003 meeting, Willingham expressly agreed to Hoglund’s right to 80 per cent of the contingent fee from the first $150,000 of any settlement. Willingham challenges this finding of fact, arguing that there could have been no meeting of the minds when Hoglund’s exact fee and the scope of his future involvement in the litigation was uncertain. We disagree.

§ 43 Although some contract terms lacked specificity, substantial evidence supports the trial court’s ruling. The evidence at trial showed that Hoglund offered to step down as lead counsel in the Bostwick litigation, turn over all of his work product, and maintain a limited role in exchange

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for a fixed attorney fee on the first $150,000 recovered and an additional fee based on whether the case settled or went to trial. Willingham accepted this offer when she accepted all of Hoglund’s work product, kept him involved in the case, and repeatedly promised to work out the specific terms of a written memorialization [170 P.3d 47] of their agreement. See Goodman v. Darden, Donnan & Stafford Assoc., 100 Wash.2d 476, 483, 670 P.2d 648 (1983); RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981) (implied acceptance when offeree takes benefit of offered services with an opportunity to reject
them and chooses not to).

§ 44 In addition, Hoglund and Willingham discussed the fee agreement against a backdrop of having worked together on this case for seven years, and on many other cases, similarly splitting attorney fees along these same lines. Furthermore, after settling the Bostwick litigation, Willingham immediately contacted Hoglund to inform him that he would receive his $40,000. [8] Taken together, this conduct supports the trial court’s finding that Willingham articulated an agreement with Hoglund to pay him this base fee and that she intended to be bound by her agreement.

§ 45 Nevertheless, the trial court specifically found the contract terms too indefinite to form the basis of a contract to pay Hoglund future fees for more than this base $40,000. For that reason, the trial court concluded that Willingham and Hoglund had a contract for only the base fee of $40,000. The record supports the trial court’s findings of fact, which in turn support its conclusions of law.

C. Hoglund’s Contract with Meeks

§ 46 Meeks argues that the trial court made no specific findings that he agreed to contract with Hoglund and, thus,

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the record does not substantiate the trial court’s conclusion that Defendants are jointly and severally liable. Meeks is correct that the trial court did not find an express agreement between him and Hoglund. Unlike Willingham, Meeks neither negotiated a fee agreement with Hoglund nor had an extensive history of legal cooperation and split fees with him. This fact, however, is not determinative of the issue before us.

§ 47 The trial court found that Meeks was fully aware of Willingham’s agreement with Hoglund, that Meeks accepted the benefits of this agreement, and that he remained silent without objecting to Hoglund’s belief that he was entitled to a portion of the Bostwick litigation recovery. The record supports the trial court’s finding. Meeks knew that Hoglund had brought this case back to Willingham with the understanding that he would relinquish his role as lead counsel in exchange for a reduced attorney fee on any future recovery. Meeks was well aware that Hoglund had invested years in the case, during which Hoglund had taken depositions, answered interrogatories, retained experts, developed trial strategy, and compiled a mediation packet. With this background knowledge, Meeks took over Hoglund’s work product and, only two months later, settled Bostwick’s case for $840,000, including $190,000 for attorney fees. As the trial court correctly found, if Meeks did not wish to contract and to share attorney fees with Hoglund, Meeks could not passively take over Hoglund’s multi-year work

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product and reasonably expect to keep for himself all the attorney fee benefits without paying Hoglund his share. See RESTATEMENT (SECOND) OF CONTRACTS § 69.

§ 48 Again, whether Meeks demonstrated acceptance of Willingham’s fee-sharing contract with Hoglund through his silence is a factual question for the trial court, which was in a better position to examine credibility and to weigh evidence. In performing this function, the trial court found Hoglund credible and Meeks not credible. The trial court further found that Hoglund offered his work product through Willingham to Meeks and that Meeks used

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Hoglund’s work product, knowing that Hoglund expected compensation. We hold, therefore, that the trial court had substantial evidence to find that Meeks ratified the fee-sharing contract through his silence.

III. MEKES’ PUBLIC POLICY ARGUMENT

§ 49 Meeks separately argues that it is a violation of public policy for Hoglund to retain [170 P.3d 48] an interest in the Bostwick contingent fee because he withdrew from the litigation. We disagree. Neither the facts nor public policy support Meeks’ position.

§ 50 Meeks relies on MAZON v. KRAFCHICK, 158 Wash.2d 440, 144 P.3d 1168 (2006), and RPC 1.5(e) as authority for his position. MAZON involves an attorney suing his co-counsel in exchange for a reduced attorney fee on any future recovery. Here, in contrast, Hoglund seeks to collect actual fees based on contract for work he performed in the past, which work contributed to Bostwick’s favorable settlement.

§ 51 Moreover, RPC 1.5(e) specifically allows division of attorney fees in proportion to the “services provided” or “by written agreement with the client.” Here, Hoglund seeks a division of attorney fees based on proportion of his “services provided.” The RPC specifically allows this type of attorney fee split; therefore, it is not contrary to public policy [9].

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IV. EVIDENCE OF SETTLEMENT

§ 52 Defendants contend that the trial court erred in admitting testimony about the two mediations in the Bostwick litigation, contrary to RCW 5.60.070(1). We disagree.
A. Standard of Review

§ 53 Admission of evidence is within the trial court's sound discretion. We will not reverse absent a showing of abuse of trial court discretion, even if we might have excluded the proffered evidence had we been in the trial court's position. See State v. Sethjoen, 48 Wash. App. 139, 147, 738 P.2d 306, review denied, 108 Wash.2d 1033 (1987).

§ 54 Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). We hold that Defendants have not met this high standard here.

B. RCW 5.60.070(1)

RCW 5.60.070(1) provides:

If there is a court order to mediate, a written agreement between the parties to mediate, or if mediation is mandated under RCW 7.70.100, then any communication made or materials submitted in, or in connection with, the mediation proceeding, whether made or submitted to or by the mediator, a mediation organization, a party, or any person present, are privileged and confidential and are not subject to disclosure in any judicial or administrative proceeding except:

(a) When all parties to the mediation agree, in writing, to disclosure;

(b) When the written materials or tangible evidence are otherwise subject to discovery, and were not prepared specifically for use in and actually used in the mediation proceeding;

(c) When a written agreement to mediate permits disclosure;

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(d) When disclosure is mandated by statute;

(e) When the written materials consist of a written settlement agreement or other agreement signed by the parties resulting from a mediation proceeding;

(f) When those communications or written materials pertain solely to administrative matters incidental to the mediation proceeding, including the agreement to mediate;

(g) In a subsequent action between the mediator and a party to the mediation arising out of the mediation.

[170 P.3d 49] § 55 Defendants are correct that a contract dispute among attorneys is not one of the enumerated exceptions to nondisclosure under RCW 5.60.070. Nor is there any Washington case law discussing these exceptions. Thus, we address an issue of first impression.

§ 56 The similar language of ER 408, which addresses the admissibility of compromise and offers to compromise, informs our decision. ER 408 bars admission of settlements and settlement offers "to prove liability for or the invalidity of the claim or its amount." Nonetheless, the rule allows evidence of settlements and settlement negotiations for purposes other than to prove liability. See, e.g., Bros. v. Pub. School Employees of Wash., 88 Wash. App. 398, 408-09, 945 P.2d 208 (1997) (trial court properly admitted settlement negotiations to show that the defendant did not repudiate the contract). This admissible purpose of such evidence under ER 408 echoes a similarly admissible purpose under RCW 5.60.070(1)'s sixth exception, which allows evidence of a mediation:

(f) When those communications or written materials pertain solely to administrative matters incidental to the mediation proceeding, including the agreement to mediate....

§ 57 Hoglund introduced evidence of the Bostwick mediation solely to demonstrate his damages from unpaid attorney fees; this purpose had no bearing on the issue of liability in the underlying litigation between Bostwick and his tortfeasor. Thus, evidence of the Bostwick mediation is admissible under ER 408 to prove the existence of attorney-

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fee-sharing agreements, which have no bearing on the inadmissible purpose of proving Bostwick's tortfeasor's liability in the underlying negligence action.

§ 58 We hold, therefore, consistent with ER 408, that RCW 5.60.070 does not prohibit evidence of the Bostwick mediation to prove Hoglund's entitlement to a share of the attorney fees in the Bostwick litigation, a purpose separate from the statutorily prohibited purpose of establishing liability in that underlying action.

§ 59 Furthermore, a common sense reading of the statute extends the mediation confidentiality privilege to Bostwick and his tortfeasor's insurance company to prevent introducing evidence of their mediation if their case had gone to trial. This statutory confidentiality privilege does not, however, extend to their attorneys, namely the litigants here -- Hoglund, Meeks, Willingham, and Goldstein. Because neither Bostwick nor his tortfeasor's insurance company is a party to the instant attorney-fee-sharing lawsuit, there is no proper party to assert the statutory privilege here.

§ 60 Therefore, in addition, we hold that the trial court did not violate RCW 5.60.070 and did not err in admitting evidence of the two Bostwick mediations in the
V. PREJUDGMENT INTEREST

§ 61 Defendants Willingham and Golstein argue that the trial court erred in awarding prejudgment interest on Hoglund's $40,000 award for breach of contract. This argument also fails.

§ 62 Washington courts allow prejudgment interest only when a claim is liquidated. A liquidated claim is one "where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." *Car Wash Enter., Inc. v. Kampanos*, 74 Wash. App. 537, 548-49, 874 P.2d 868 (1994).


If, on the other hand, a fact finder using discretion in arriving at a judgment amount, the award is unliquidated, *Daniel v. Heritage Home Center, Inc.*, 89 Wash. App. 148, 153, 948 P.2d 397 (1997), review denied, 135 Wash.2d 100, 959 P.2d 126 (1998).

§ 63 Here, the trial court found that (1) Hoglund and Willingham had agreed that Hoglund was entitled to 80 percent of the contingent fee on the first $150,000 of the Bostwick settlement,[11][2] (2) the contingent attorney fee on $150,000 was $50,000; and (3) 80 percent of that attorney fee yielded $40,000 in attorney fees for Hoglund. The trial court exercised no discretion and engaged in no guesswork in computing this result. On the contrary, the trial court found a definite contract and applied the terms of the contract to compute the amount of damages and to render the $40,000 judgment in favor of Hoglund.

§ 64 We hold that the trial court used the contract's formula to arrive at a liquidated damages amount and, therefore, it appropriately awarded prejudgment interest to Hoglund.

§ 65

VI. SERVICE

§ 66 Willingham and Goldstein challenge the trial court's finding of fact that Hoglund properly served Willingham with a complaint and summons. They argue that the trial court erred in believing the legal messenger's sworn declaration instead of Willingham's in-court testimony and Willingham's secretary's declaration.


§ 68 Accordingly, we affirm the trial court's finding that Hoglund served Willingham.

VII. ATTORNEY FEES

§ 69 Hoglund requests attorney fees under RAP 18.1 on grounds that Defendants' appeal is frivolous under RAP 18.9. An appeal is frivolous only when a party brings the action for the purposes of delay and intelligent minds could not differ as to the appropriate outcome. *Millers Cas. Ins. Co. of Texas v. Briggs*, 100 Wash.2d 9, 15, 665 P.2d 887 (1983).

§ 70 Here, reasonable minds could easily differ on the questions of Willingham's apparent authority and her contract formation with other attorneys. We hold, therefore, that the Defendants' appeal is not frivolous and attorney fees are not warranted under RAP 18.9(a).

§ 71 Affirmed.

We concur: BRIDGEWATER, J., and VAN DEREN, A.C.J.

Notes:


[2] The trial court did not articulate its reason for finding that Willingham had apparent authority to contract for Goldstein.

[3] Although Hoglund and Meeks never had an explicit attorney fee-sharing agreement, the trial court found that Meeks' silence, knowing that Willingham and Hoglund had agreed to the base attorney-fee-sharing contract, constituted an implicit ratification of that contract. RP (June 9, 2006) 12-13. The following exchange took place between Meeks and the trial court:

MEEEKS: But the question here is: Am I jointly and severally liable on a contract obligation in a contract that I have never entered? And he [Hoglund] says I didn't
enter it. There's no finding that I entered a contract with that . . . if there was a contract -- there was a relationship between Hoglund and the Goldstein firm. Hoglund left the position. They then hired me as the lead trial counsel. I didn't have anything to do with that contract.

THE COURT: I think your silence -- your silence in this whole proceeding, in my mind, bounds you to that agreement. And I think I even said when I heard this case -- might not have been legalese, but I think you just sucked in Mr. Hoglund. You remained silent and took advantage of his abilities and experience and work, and he is the one that structured all the biggest cases by far, the material that was necessary to arrive at $850,000. And as far as I saw it, it was just unfortunate, he did not go further to solidify his interest in the total settlement. And you took advantage of him, and didn't pay him. And that's how simple it was.

[4]The trial court stated there was uncontradicted testimony that Willingham did not have actual authority to contract on behalf of Goldstein. Although we can affirm the trial court on any proper ground, we do not address whether Willingham had actual authority because (1) Hoglund did not cross appeal this finding, and (2) it is unnecessary in light of our affirmance of the trial court's finding of apparent authority.

[5]See also King v. Ricekland, 125 Wash.2d 530, 508-09, 886 P.2d 160 (1994) (authority to administer sex offender treatment program carries apparent authority to grant confidentiality to treatment participants). Pierson v. United States, 527 F.2d 459, 462-63 (9th Cir. 1975) (authority to allow use of federal aircraft to one state employee created apparent authority to allow similar flights for other state employees).

[6]Goldstein attempts to analogize the situation here to Smith, where we held that an agent did not possess apparent authority when the agent was acting outside of his assigned role. 63 Wash. App. at 366, 818 P.2d 1127. In finding no apparent authority, we reasoned that hiring an agent as a "manufacturing manager," as well as providing him with business cards and a phone extension, could not lead to an objectively reasonable belief that the agent was authorized to sell materials. Id. But the situation here is distinguishable. Unlike Smith, Goldstein allowed Willingham to control every aspect of the Bostwick litigation, and he did not limit her role or responsibility in any fashion. Thus, Goldstein communicated to third parties, through his tacit approval of Willingham's actions, that she had the authority to manage the Bostwick case in every respect.

[7]Hoglund proposes an alternative argument that, even if there was no authority, Goldstein ratified the contract between him (Hoglund) and Willingham. A principal ratifies an agent's agreement if the principal (1) receives, accepts, and retains benefits from the contract; (2) remains silent or fails to repudiate the contract; or (3) otherwise exhibits conduct demonstrating adoption and recognition of the contract. Burnes v. Treece, 15 Wash. App. 437, 443, 549 P.2d 1152 (1976). The record before us on appeal does not support this argument.

[8]See Joseph M. Perillo, Corbin on Contracts § 2.8 (1993) ("parties may not give verbal expression to such vitally important matters as price . . . and yet they may actually have agreed upon them. This may be shown by their antecedent expressions, their past action and custom, and other circumstances.")

[9]Hoglund notes the irony in Meeks' raising this issue when Meeks had no written fee agreement with Bostwick and, thus, Meeks' only right to a contingent fee in the Bostwick litigation is based on the portion of the Bostwick settlement attributable to Meeks' services. Willingham and Meeks secured a $190,000 contingent fee, and the trial court specifically found that their work on the case was minimal. Thus, if a trial court actually divided up the fee according to the work each attorney performed, Meeks might owe Hoglund more than the $40,000 judgment at issue here.

[10]We further note that Defendants' reasoning would lead to problematic results, as the following hypothetical demonstrates: Upon receiving his $840,000 settlement after the mediation, Bostwick could have refused to pay any of his lawyers the fees to which they were entitled. Under Defendants' theory, if Meeks and Willingham had sued Bostwick to recover their fees, the statute would have excluded any testimony about the second mediation, which produced Bostwick's recovery and which represented the major portion of Meeks' work on the case. And without such testimony, neither Meeks nor Willingham would have been able to recover their attorney fees.

It has been a long-standing practice for plaintiffs' attorneys to earn their livelihood through contingent fees, frequently from negotiating settlements and participating in mediations. Reading RCW 5.60.070 to exclude the fact of settlement or mediation and agreed damages amounts would thwart these lawyers' ability to recover attorney fees. We cannot conceive that the Legislature intended such a result.

[11]The trial court found that the parties had not reached an agreement on any additional amounts.
This case involves a dispute between two attorneys who had represented a client in a personal injury action. The client's lawsuit was dismissed after one of the attorneys failed to timely serve the complaint and the statute of limitations expired. The client brought a claim for malpractice against both attorneys, which was settled for $1.3 million. The dispute arose when Michael Mazon [144 P.3d 1170] sued his cocounsel Steven Krafchick, seeking to recover for the loss of his expected contingency fee, for the amount his insurance company paid to settle the client's lawsuit, for his out of pocket insurance deductible, and for the costs he advanced in the client's lawsuit. The issues presented are whether, under these facts, cocounsel may sue one another for the loss of prospective fees and whether the collateral source rule applies to money paid by the insurance carrier.

The trial court dismissed the claims on summary judgment. The Court of Appeals affirmed the trial court's ruling that public policy prohibits one cocounsel from recovering against the other for the loss of an expected contingency fee under any circumstances. The Court of Appeals reversed the trial court and held that the collateral source rule applied and allowed full recovery of the amount the insurance carrier had paid to settle the claim. We affirm in part and reverse in part and reinstate the trial court decision.

FACTS

On May 18, 1999, Tahar Layouni was electrocuted and seriously injured when a drilling company drilled into a buried electric line and caused a charge to surge through the area where Layouni was working. In July 1999, Layouni retained attorney Michael Mazon to represent him to recover damages for his resulting fibromyalgia and chronic pain. With Layouni's consent, Mazon associated Steven Krafchick, an attorney with special expertise in this area. Mazon and Krafchick agreed in what the parties consider a "joint venture agreement" to split fees and costs equally.[1] Clerk's Papers (CP) at 26. They divided the responsibilities informally. Mazon would draft the complaint and find the addresses and agents of defendants to serve, and Krafchick would file and serve the complaint. CP at 28.

After Mazon drafted the complaint and found the addresses of the agents, Krafchick filed the complaint on May 15, 2002. Since the filing of the complaint tolled the statute of limitations for 90 days, the deadline for serving the defendants was August 13, 2002. Krafchick directed his paralegal to serve the complaint. Though she told Krafchick she had timely served the complaint, she had failed to do so until August 16, 2002, after the statute of limitations expired on Layouni's personal injury claim. In late September, Krafchick told Mazon he had failed to timely serve the complaint. He then drafted a letter to Mazon confirming that he had been responsible for filing and serving the complaint. CP at 28.

The client's suit was dismissed. Layouni then asserted a claim against both Krafchick and Mazon for professional negligence. CP at 98-99. The attorneys were covered by the same malpractice insurance carrier. In mediation, that insurance carrier settled Layouni's claim for $1.3 million. CP at 99. Layouni would not agree to settle his claim unless Mazon also contributed to the settlement and thus the insurance carrier paid $1,250,000 on behalf of Krafchick and $50,000 on behalf of Mazon. CP at 135-36.

Mazon then filed this lawsuit against Krafchick, asserting causes of action for breach of the agreement, breach of fiduciary duties, professional negligence, and indemnification. Mazon sought damages under each cause of action for (1) the costs he advanced in representing Layouni of $465; (2) the loss of the fee he expected to earn of $325,000;[2] (3) his insurance deductible of $2,500; and (4) the payment of $50,000 his insurance carrier contributed to the settlement of Layouni's claim. CP at 19.
On cross motions for summary judgment, the trial court dismissed Mason's causes of action for breach of the agreement and breach of fiduciary duties. The court denied Mason's request for prospective attorney fees on the grounds that allowing claims for reduced or lost fees would be potentially inconsistent with cocounsel's overriding duties to their client. The court also denied Mason's requests for damages in the amount his insurance company paid to settle Layouni's professional negligence claim. The court reasoned that absent gross negligence or intentional misconduct, claims between cocounsel should be strictly limited to lost costs or expenses advanced, if any, by the nonnegligent cocounsel.

Based on the declarations presented in support of the summary judgment motions, the court found that Krafchick was not grossly negligent and did not engage in intentional misconduct. But the court stated that it "finds Mason free of fault and entitled to recover costs and expenses lost as a proximate result of defendant's negligence. The Court finds that defendant's negligent conduct proximately caused plaintiff's loss of 'costs advanced' and other out of pocket expenses." CP at 580. The court reasoned, because no evidence was presented to support a finding of plaintiff's negligence (comparative fault), Mason was entitled to recover his lost costs and expenses. The court awarded Mason $465 in costs and the insurance deductible of $2,500 he had paid out of pocket to defend Layouni's professional negligence claim. CP at 580.[3] Both parties appealed.

The Court of Appeals affirmed the denial of Mason's expected contingency fee and adopted a broad rule prohibiting cocounsel from suing each other for lost or reduced prospective attorney fees. The court also held the collateral source rule applied to the $50,000 paid by Mason's insurance carrier because Mason's portion of the Layouni settlement was an "injury" to him that was in turn covered by his insurance company. Mason v. Krafchick, 126 Wn.App. 207, 220-21, 108 P.3d 139 (2005). The court denied both parties' motions for reconsideration.

Mason filed a petition for review of whether he is entitled to recover prospective fees. Krafchick filed a petition for review of whether Mason may recover the amount paid by his insurance company. We granted both petitions. Mason v. Krafchick, noted at 156 Wash.2d 1010, 132 P.3d 146 (2006).

ANALYSIS

Recovery of Prospective Fees

The extent to which an attorney may sue cocounsel for the loss of prospective fees is an issue of first impression in Washington. The Court of Appeals followed the approach of the California courts and rejected the argument that cocounsel owe fiduciary duties to each other on the theory that the latter's malpractice in handling their mutual client's case reduced or eliminated the fees the former expected to realize from the case. Mason, 126 Wash.App. at 216-17, 108 P.3d 139 . Relying on Beck v. Wechtt, 28 Cal.4th 289, 290, 48 P.3d 417, 121 Cal.Rptr.2d 384 (2002), the Court of Appeals noted, "it would violate public policy to allow attorneys to sue each other on the theory that 'cocounsel have a fiduciary duty to protect one another's prospective interests in a contingency fee.'" Mason, 126 Wash.App. at 215, 108 P.3d 139 (quoting Beck, 28 Cal.4th at 291, 121 Cal.Rptr.2d 384, 48 P.3d 417).

The court recognized that Mason's claim in this case did not create an actual conflict with his and Krafchick's undivided loyalty to Layouni, but decided that public policy dictates against allowing claims between cocounsel for lost prospective fees because of the potential conflict with the undivided loyalty owed to the client. The court reasoned that a bright-line rule is preferable [144 P.3d 1172] because it prevents conflicts from arising at any point during the representation, assures the client's interest is paramount regardless of the issue, and is easy to administer. Mason, 126 Wash.App. at 220, 108 P.3d 139. Thus, the court rejected Mason's claim on the basis that recovering damages for a prospective contingency fee lost through a misfeasance of cocounsel assumes a duty to conduct the lawsuit in a manner that does not diminish or eliminate the fee each expects to collect. We agree. Imposing a duty to protect prospective fees would create potential impermissible conflicts with the duty of loyalty the attorneys owe their clients.

The potential conflict of interest identified by the California Supreme Court in Beck involved the undivided duty of loyalty that attorneys owe to their clients. The court held this duty may be violated if cocounsel were allowed to sue one another based on a fiduciary duty to protect one another's prospective interests in a contingency fee. In Beck, cocounsel represented two clients in a personal injury action against a truck manufacturer. Pretrial settlement efforts were unsuccessful. On the evening Before closing arguments, the defendant offered to settle the case for $6 million. The clients instructed the attorneys to accept the settlement. But the local counsel failed to accept the settlement offer as instructed by the clients, and the jury returned a defense verdict. The lead counsel sued the local counsel seeking to recover the contingency fee he had expected to earn in the case. The California Supreme Court denied relief on the basis that his claim was contrary to public policy. To avoid any detriment to the jointly represented clients, the court held that no collateral duties could arise that would interfere with the duty of undivided loyalty and total devotion owed to the clients. See Beck, 28 Cal.4th at 297-98, 121 Cal.Rptr.2d 384, 48 P.3d 417.

Consistent with Beck, the Court of Appeals in
this case recognized that "Washington ethical rules are clear that 'it is the duty of the lawyer to his client. No exceptions can be tolerated.' Public policy prohibits an attorney from owing a duty to anyone other than the client when the collateral duty creates a risk of divided loyalty due to conflicts of interest or breaches of confidence." Mazon, 126 Wash.App. at 216-17, 108 P.3d 139 (footnote omitted) (internal quotation marks omitted) (quoting Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 388, 715 P.2d 1133 (1986)). The Court of Appeals rejected Mazon's argument that his claim based on Krafchick's malpractice did not create a potential conflict of interest with either attorney's overriding duty to their client. The court reasoned that Krafchick did not owe Mazon a duty to pursue the case in any particular manner because those duties were to Layouni alone. Therefore, the court concluded that allowing cocounsel to sue each other for lost prospective fees, regardless of the basis for the claim, implicates the same concerns as discussed in Beck.

§15 We agree with the Court of Appeals' reasoning and adopt a bright-line rule that no duties exist between cocounsel that would allow recovery for lost or reduced prospective fees. As cocounsel, both attorneys owe an undivided duty of loyalty to the client. The decisions about how to pursue a case must be based on the client's best interests, not the attorneys'. The undivided duty of loyalty means that each attorney owes a duty to pursue the case in the client's best interests, even if that means not completing the case and forgoing a potential contingency fee.

§16 If we were to recognize an attorney's right to recover from cocounsel prospective fees, potential conflicts of interest that harm the client's interests may arise. Cocounsel may develop an impermissible self-interest in preserving the claim for the prospective fee, even when the client's interests demand otherwise. Additionally, the question of whether an attorney's claim conflicts with the client's best interests may be difficult to answer. Discretionary, tactical decisions, such as whether to advise clients to settle or risk proceeding to trial and determining the amount and structure of settlements, could be characterized by cocounsel as a breach of the contractual duties or general duties of care owed to one another and provide a basis for claims seeking recovery of prospective [144 P.3d 1173] fees. As the California Supreme Court recognized, in comparing the issue to lawsuits for prospective fees between successive attorneys:

[ ] public confidence in the legal system may be eroded by the spectacle of lawyers squabbling over the could-have-beens of a concluded lawsuit, even when the client has indicated no dissatisfaction with the outcome. Considerations of public policy support the conclusion that an attorney's duty of undivided loyalty to his client should not be diluted by imposing upon him obligations to the client's former attorney, or at least obligations greater than the client himself owed to the former attorney.

Beck, 28 Cal.4th at 296, 121 Cal.Rptr.2d 384, 48 P.3d 417.

§17 Mazon contends that prohibiting cocounsel from suit each other for prospective fees would undermine the public's confidence in the legal system because cocounsel could not be held fully liable to each other. He states that "when an attorney can recover only nominal damages from cocounsel, despite the loss of a substantial prospective fee, but is confronted with a significant claim for professional negligence from the client through no fault of his own, the incentive will be to collude with cocounsel to minimize or to conceal the client's malpractice claim. Absent a viable legal remedy to recover his own damages, an attorney is thus more likely to be less diligent about protecting the interests of the client, rather than more." Mazon's Pet. for Review at 12-13. Under these circumstances, he argues, the attorney's interest in protecting himself from liability will trump his duty of undivided loyalty to the client. However, we find this argument unpersuasive because it presumes that allowing cocounsel to recover prospective fees will eliminate attorneys' incentive to collude and protect themselves from liability. Instead, we believe that allowing cocounsel to recover prospective fees would create the opposite incentives to overemphasize the informal divisions of responsibilities between cocounsel, overlook any failings of cocounsel, and later claim that cocounsel's failures were not their responsibility. Prohibiting cocounsel from suing each other for prospective fees arising from an attorney's malpractice in representing their mutual client provides a clear message to attorneys: each cocounsel is entirely responsible for diligently representing the client.

§19 The Court of Appeals correctly recognized that this approach encourages cocounsel to back each other up and ensure that there are fewer mistakes in pursuing the best outcome for the client. Cocounsel are in the best position to ensure that they are not injured by each other's mistakes. This approach is consistent with the attorneys' duty to maintain undivided loyalty to the client. The public interest is best served by this approach because attorneys must exercise diligence when choosing and working with cocounsel to preserve the undivided duty to the client. We affirm the Court of Appeals on this issue and adopt the bright-line rule rejecting the recognition of a duty upon which cocounsel could recover from each other prospective attorney fees.

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Recovery of Insurance Payment

§20 Mazon's complaint sought recovery of his insurance payment under each of the four causes of
action he alleged. The Court of Appeals held the collateral source rule applied to give Mazon a basis for recovering the $50,000 settlement his insurance carrier paid Layouni. The Court of Appeals did not identify the cause of action on which it deemed Mazon was entitled to recover from Krafchick. By failing to identify the basis for ruling that Mazon was entitled to recover the settlement amount his insurance company paid to Layouni, the Court of Appeals evidently applied the collateral source rule as an equitable cause of action, not an evidentiary rule.

21 The Court of Appeals may have believed Mazon was entitled to relief under his indemnity cause of action from Krafchick because the parties both believed the trial court granted Mazon's indemnification claim. But Mazon and Krafchick had no contractual agreement to indemnify each other, and Mazon provides no legal basis for a right to indemnification from Krafchick.

22 If Mazon's claim for indemnity is analyzed as a claim for contribution, he is still not entitled to relief from Krafchick. In the absence of contractual indemnity, a party's right to contribution, also referred to as equitable indemnity, is governed by chapter 4.22 RCW. "Contribution" is "a tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." Black's Law Dictionary 353 (8th ed. 2004). The contribution statute provides that the right of contribution is limited to parties who have been held jointly and severally liable for the plaintiff's injury. RCW 4.22.070.

23 Joint and several liability, which gives rise to a claim for contribution, only exists in limited circumstances, including where the plaintiff is free of fault and judgment has been entered against two or more defendants. RCW 4.22.070.

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.070. We have interpreted this provision to mean that "[s]ettling parties, released parties, and immune parties are not parties against whom judgment is entered and will not be jointly and severally liable...." Kottler v. State, 136 Wn.2d 437, 447, 963 P.2d 834 (1998). Mazon does not establish that he meets any of the limited circumstances where defendants are considered jointly and severally liable. Although Layouni may have been free of fault, no judgment was entered against Mazon and Krafchick. Therefore, they were not held jointly and severally liable, and Mazon is not entitled to contribution. Because Mazon is not entitled to indemnity or contribution from Krafchick, Mazon is not entitled to recover and the collateral source rule is inapplicable.

24 The collateral source rule is an evidentiary principle that enables an injured party to recover compensatory damages from a tortfeasor without regard to payments the injured party received from a source independent of a tortfeasor. Johnson v. Weyerhaeuser Co., 134 Wn.2d 795, 798, 953 P.2d 800 (1998). The rule comes from tort principles as a means of ensuring that a fact finder will not reduce a defendant's liability because the claimant received money from other sources, such as insurance carriers. This rule, however, does not create a cause of action and does not apply under the facts of this case. The Court of Appeals erroneously applied the collateral source rule as an equitable cause of action, allowing Mazon to recover the amount paid by his insurance carrier because of Krafchick's negligence.

CONCLUSION

25 We affirm the Court of Appeals' conclusion that Mazon is not entitled to recover prospective attorney fees from Krafchick. Where each attorney owes an undivided duty of loyalty to his or her mutual client, cocounsel's claim for prospective attorney fees creates an impermissible potential for conflicts of interest.

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26 We reverse the Court of Appeals' determination that the collateral source rule entitles Mazon to recover for the amount his insurance carrier paid to settle the client's professional negligence action.

WE CONCUR: ALEXANDER, C.J., CHAMBERS, OWENS, MADSEN, FAIRHURST, J.M. JOHNSON, and BRIDGE, JJ.

SANDERS, J. (dissenting).

27 The majority holds an attorney can never recover prospective fees from cocounsel. I disagree. Instead of focusing on the facts at hand, the majority seeks to prevent any possible conflict at any possible time in any possible case. Majority at 10 (fearing "potential conflicts of interest that harm the client's interests may arise" (emphasis added)). It claims any liability between attorneys for prospective fees creates a fiduciary duty between attorneys, which might interfere with an attorney's duty of loyalty to the client. The duty breached here, however, is the standard duty of due care every professional owes to any foreseeable plaintiff as well as the duty we all have not to break our contracts. And there is no conflict of interest if an attorney recovers fees from cocounsel because cocounsel has already damaged the mutual client's case through his own negligence.

28 Tahar Layouni was injured and retained Michael Mazon to recover for his personal injury. Mazon associated Steven Krafchick as cocounsel. Both entered into a joint venture agreement to "split fees and costs equally." Clerk's Papers (CP) at 26, where Mazon was to draft the complaint and find the addresses
of the defendants for service, and Krafchick was to file and serve the complaint. Krafchick failed to do his part and as a consequence Layouni's case was dismissed. Layouni then sued both attorneys for malpractice and recovered $1.3 million. If Layouni had recoverd this net amount at trial, after paying an agreed one-third contingent fee, each attorney would have received a $325,000 fee. However because of Krafchick's inaction, Mazan was denied any fee. Mazan has three distinct theories to support recovery: tort, contract, and unjust enrichment.

29 I agree an attorney owes every client an undivided duty of loyalty, and this duty is inviolate and must be protected. But the majority's rule is so broad it insulates attorneys from responsibility for their professional negligence even where there is no remaining duty to the client to protect. After Krafchick breached his duty of care, resulting in dismissal of the case, Layouni no longer needs Krafchick's loyalty. But instead of providing the proper remedy to Mazan for Krafchick's negligence, the majority protects Krafchick, providing a broad shield apparently available only to lawyers.

1. Krafchick breached his duty of care to Mazan

30 Any other professional must bear the cost of his negligence.[1] The majority looks to California precedent to support the claim there is no fiduciary duty between lawyers. Majority at 7 (citing Beek v. Weech, 58 Cal.4th 289, 290, 48 P.3d 417, 121 Cal.Rptr.2d 381 (2002)). However, Beek only holds an attorney does not have a fiduciary duty to protect a cocounsel's fees. That is all it holds. Beek, 58 Cal.4th at 298.[2] But even assuming an attorney owes no fiduciary duty to cocounsel he must still exercise that duty of care and act as a reasonable attorney would under similar circumstances. Restatement (Third) of Law Governing Lawyers § 52, at 375 (2000) ("[A] lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances."). A lawyer owes a duty of care to nonclients when:

(a) [T]he lawyer... invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and

(b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection.

Id. § 51(2), at 356-57.[3] Under this rule Krafchick owed Mazan a duty because 144 P.3d 1176] Krafchick invited Mazan to rely on the provision of his legal services, and Mazan did rely. Discussing the rule's rationale, the American Law Institute balances the same concerns raised by the majority:

Lawyers regularly act in disputes and transactions involving nonclients who will foreseeably be harmed by inappropriate acts of the lawyers. Holding lawyers liable for such harm is sometimes warranted. Yet it is often difficult to distinguish between harm resulting from inappropriate lawyer conduct on the one hand and, on the other hand, detriment to a nonclient resulting from a lawyer's fulfilling the proper function of helping a client through lawful means. Making lawyers liable to nonclients, moreover, could tend to discourage lawyers from vigorous representation. Hence, a duty of care to nonclients arises only in the limited circumstances described in the Section.

Id. § 51 cmt. b at 358. And these limited circumstances are present here. Mazan was foreseeably harmed by Krafchick's failure to timely serve the defendant.

Concerns militating against liability are not present here. There is no difficulty distinguishing the harm resulting from Krafchick's negligence and Krafchick's assisting his client. Krafchick was not helping his client when he failed to timely serve a complaint. Nor does liability discourage vigorous representation, rather liability encourages zealous advocacy.

31 Krafchick is also liable under section 56 of the Restatement. This section provides "a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances." Id. § 56, at 416. Unlike the majority, the Restatement makes no special exemption for attorneys:

Lawyers are subject to the general law. If activities of a nonlawyer in the same circumstances would render the nonlawyer civilly liable or afford the nonlawyer a defense to liability, the same activities by a lawyer in the same circumstances generally render the lawyer liable or afford the lawyer a defense.

Id. § 56 cmt. b at 416. Krafchick would generally be liable for his negligence. His negligence arguably cost Layouni $1.3 million in potential recovery and Mazan $325,000 in potential fees. Layouni recovered his share in the form of a credit to the settlement. However Mazan recovered nothing.

32 The majority fears attorneys might "develop an impermissible self-interest in preserving the claim for prospective fees, even when the client's interests demand otherwise." Majority at 10. This is fiction. Krafchick's negligence would never be in the client's interest. An attorney must always timely serve a complaint and failure to do so may be negligent. When an attorney commits malpractice and that same misconduct damages cocounsel, there is no reason both the client and cocounsel should not be allowed to recover. This result does not jeopardize an attorney's duty of loyalty, it promotes it.
II. Krafchick breached his contract to Mazon

§33 In its eagerness to announce its broad rule, the majority conflates Mazon's causes of action and unwittingly attacks the freedom to contract. Even if an attorney can be specially insulated from his professional responsibilities, surely he must be at least held to his contracts. Krafchick and Krafchick explicitly agreed to bear and divide the responsibilities, costs, and profits of their joint venture. CP at 26. Mazon agreed to prepare the complaint and Krafchick agreed to serve it. Mazon held up his end of the bargain; Krafchick breached his.

§34 When a contract is breached, the non-breaching party is generally entitled to expectation damages. The Restatement (Second) of Contracts entitles Mazon to:

(a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus

(b) any other loss, including incidental or consequential loss, caused by the breach, less

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(c) any cost or other loss that he has avoided by not having to perform.

Restatement (Second) of Contracts § 347, at 112 (1981). quoted with approval in Eastlake Constr. Co. v. Hess, 102 Wn.2d 30, 46, 686 P.2d 465 (1984). Krafchick breached his promise to serve the complaint, costing Mazon any fee he would have earned. The majority does not address Mazon's contractual claims and suggests no reason why breach of the contract should also be excused. The Court of Appeals rejected Krafchick's contract claims because it claimed the agreement created the specter of a divided duty of loyalty. But there was no inconsistency here between serving the interests of the client and the cocounsel. If an attorney cannot hold cocounsel liable for a breach of contractual obligations between them, contracts become meaningless scraps of paper. The law holds Krafchick must be held to his contract, but the majority's decision threatens the integrity of any cocounsel agreement.

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III. Krafchick will be unjustly enriched if allowed to keep damages owed to Mazon

§35 Equity also supports Mazon's recovery. Assuming the damages calculation was correct, Krafchick's negligence and breach of contract lost a potential $1.9 million recovery. Layouni recovered the two-thirds he was entitled to. According to the contract, Mazon was entitled to one-half the remainder. But Krafchick never had to pay. The Restatement (Third) of Restitution begins with the familiar rule: "A person who is unjustly enriched at the expense of another is liable in restitution to the other." Restatement (Third) of Restitution and Unjust Enrichment § 1 (Discussion Draft, Mar. 31, 2000).[4] The majority allows Krafchick to keep the $325,000 owed to Mazon. This is precisely what the Restatement forbids. Id. § 1 cmt. a.

IV. Public policy favors allowing Mazon to recover prospective fees

§36 The majority claims public policy motivates its holding, not preexisting legal standards. The majority accepts the Court of Appeals rationale that a bright-line rule "prevents conflicts from arising at any point during representation, assures the client's interest is paramount regardless of the issue, and is easy to administer." Majority at 7. While the majority is correct that allowing attorneys to recover prospective fees under limited circumstances may not always be easy to administer, a judge's job is not necessarily an easy one. The remaining concerns are irrelevant if an attorney loses his client's case through negligence and incompetence. Liability arose only after the malpractice. If the client's best interests were paramount, Krafchick would have timely served the defendant. Linking liability to cocounsel and liability to the client provides a greater incentive for an attorney to pursue the case.

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§37 The majority also claims letting attorneys sue one another will erode public confidence—what little remains—in the legal system. [5] This is speculation at most, not adequate reason to deny a lawyer the legal right to recover damages sustained as the result of another's negligence or breach of contractual duty. What will the image of lawyers insulating themselves from liability do? By turning a blind eye to an attorney's negligence, the majority hopes to encourage "cocounsel to back each other up and ensure that there are fewer mistakes in pursuing the best outcome for the client." Majority at 12. Apparently Mazon should have checked with Krafchick daily, acting as his cocounsel's keeper. An attorney with enough time to constantly investigate his cocounsel's activities likely does not need cocounsel in the first place. Dividing responsibilities §144 P.3d 1178 provides common clients extra talent and resources and promotes efficiency.

§38 The majority hopes to send a clear message: "each cocounsel is entirely responsible for diligently representing the client." Majority at 12 (emphasis added). The bright-line rule adopted today does the opposite; Krafchick is only partially responsible for his mistake. He breached his duties of care to both client and cocounsel. Based on the settlement amount, this cost Layouni $1.3 million and Mazon $325,000. Layouni recovered $1.3 million, while Mazon recovered nothing.

§39 Mazon should be allowed to recover his prospective fees from Krafchick. Accordingly the Court of Appeals should be reversed.
dissent.

Notes:

[1] Both parties characterize the letter confirming the agreement between them as a joint venture agreement. The agreement provided in relevant part:

This letter will embody the terms of our agreement to co-counsel on the Tahar Layouni file. As we discussed, we shall split fees and costs equally. To be sure, we shall each have a claim to 50% of the fee and shall share all costs equally.

CP at 14.

[2] The math supporting this amount proceeds as follows, according to Mazon:

Layouni received $1.3 million net recovery. A judgment of $1.95 million results in a $1.3 million net recovery. Therefore, the 1/3 contingent fee is $650,000; 1/2 of which is $325,000.

[3] Though the basis for awarding these damages appears to be negligence, the parties and the Court of Appeals identify the basis for them as indemnity. However, the trial court explicitly held that "no contribution nor indemnity claim exists as between co-counsel for indemnity and/or contribution as a matter of law and as a matter of public policy." CP at 579. Since neither party requested review on whether we should affirm the award of those costs, we decline to reach that issue.

[1] The Restatement (Second) of Torts recites the familiar standard of care for professionals: "[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." Restatement (Second) of Torts § 299A (1965). See also Hickey v. Carpenter, 119 Wn.2d 251, 261, 830 P.2d 646 (1992) ("To comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction.").

[2] In a companion case to Beck, the California Supreme Court allowed an attorney to sue cocounsel for indemnification. Masser v. Provencher, 28 Cal.4th 274, 284, 48 P.3d 408, 121 Cal.Rptr.2d 373 (2002). There was no fiduciary duty involved that might potentially divide the attorney's loyalty to his client. The California rule is more limited than what the majority creates today.

[3] The number of cases citing to section 51 of the Restatement shows lawyers must also be conscious of how their actions will affect nonclients. Whether from cocounsel or others, a lawyer is susceptible to lawsuits from nonclients. This threat does not force the lawyer to violate his duty of loyalty, it motivates him to act properly, both for his client and foreseeable plaintiffs. See, e.g., Paradigm Ins. Co. v. Langerman Law Offices, 200 Ariz. 146, 155, 24 P.3d 593 (2001) (holding "a lawyer has a duty, and therefore may be liable for negligent breach, to a nonclient under the conditions set forth in previous case law and the Restatement"); Osorno v. Weingarten, 124 Cal.App.4th 304, 312, 21 Cal.Rptr.3d 246 (2004) (allowing a disqualified beneficiary to sue the attorney who prepared the will for negligence); Banco Popular N. Am. v. Gandi, 184 N.J. 161, 186, 876 A.2d 253 (2005) (allowing a bank to sue an attorney who negligently prepared an opinion letter to the bank from the attorney's client); Friske v. Hogan, 698 N.W.2d 526, 532 (2005) (allowing children to maintain a malpractice action against the attorney for negligence in drafting their father's will).

[4] Restitution is more than a contract remedy. See restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. h at 12 (Discussion Draft, Mar. 31, 2000). Rather it is "itself a source of obligations, analogous in this respect to tort or contract." Id.

[5] The majority cites from Beck as support: "Public confidence in the legal system may be eroded by the spectacle of lawyers squabbling over the could-have-beens of a concluded lawsuit, even when the client has indicated no dissatisfaction with the outcome." Beck,28 Cal.4th at 296, 121 Cal.Rptr.2d 384, 48 P.3d 417

That hypothetical is not this case. Layouni sued both Krafcik and Mazon for malpractice; there is no greater way to indicate dissatisfaction with the outcome.